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Before the
FEDERAL COMMUNICATIONS COMMISSION
Washington, D.C. 20554

In the Matters of	)	
	)	
Rulemaking to Amend Part 1 and Part 21 of the Commission's Rules to Redesignate the 27.5 - 29.5 GHz Frequency Band and to Establish Rules and Policies for Local Multipoint Distribution Service;	)	CC Docket No. 92-297
	)	RM-7872; RM-7722
Applications for Waiver of the Commission's Common Carrier Point-to-Point Microwave Radio Service Rules;	)	
Suite 12 Group Petition for Pioneer's Preference;	)	PP-22
University of Texas - Pan American Petition for Reconsideration of Pioneer's Preference Request Denial	)	

COMPETITIVE CABLE ASSOCIATION

Comments

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Comments

The Competitive Cable Association now responds to the Commission's invitation to comment on its proposals in the captioned proceeding. The Association--also sometimes referred to as CCA--represents alternate providers of video and audio distribution services. It is wide open to membership by wireless cable operators, telephone companies, wired cable systems, ITFS arrangements, SMATV installations, 28 GHz proponents, and other multiple channel video distributors, no matter the technology.

INTRODUCTION

The Federal Communications Commission ("FCC" or "Commission") seeks comment on proposed rules to redesignate the 28 GHz band from point-to-point microwave common carrier service to a local multipoint distribution service ("LMDS"). The proposed rules would amend Parts 1 and 21 of Chapter I of Title 47 of the Code of Federal Regulations.

CCA believes that an important goal of the Commission in proposing this redesignation of the 28 GHz band is to spur competition to the entrenched cable television industry. This policy is certainly consistent with Congressional intent as embodied by the Cable Television Consumer Protection and Competition Act of 1992 ("1992 Cable Act"). Pub. L. No. 102-385, 106 Stat. 1460 (1992). CCA applauds every attempt to facilitate competition in the cable television marketplace. However, it believes that, with a few minor adjustments, the Commission's 28 GHz initiative can strike an even bigger blow for competition.

Dismissal of Early Applications Is Not in the Public Interest

CCA also believes that each of those applicants listed in Appendix C to the Commission's NPRM is entitled to have its application for spectrum at 28 GHz reinstated. The fact is that these early applications were properly filed and included appropriate waiver requests. Of course, legitimate waiver requests, made in accordance with public interest goals, may not be peremptorily denied without adequate reason. *WAIT Radio v . FCC,* 418 F.2d 1153 (1969).

"That an agency may discharge its responsibilities by

> promulgating rules of general application which, in the overall perspective, establish the 'public interest' for a broad range of situations, does not relieve it of an obligation to seek out the 'public interest' in particular, individualized cases."

Id. at 1157.

Additionally, equity mandates reinstatement since the applications are now dismissed by the same agency that induced their filing. After all, the Commission arguably induced the filings by granting the original application -- riddled with waiver requests -- in *Hye Crest Management, Inc.*, 6 FCC Rcd 332 (1991). Furthermore, the 971 "prematurely filed" applications were each "accepted for filing" and assigned call signs.

Rather than implementing a blanket denial of all 971 pre-filed applications, the Commission should view each on its merits. Many of the applications feature unique proposals and compelling waiver requests. For instance, the City of Gustine, California proposes to implement a 28 GHz service designed to bring an abundance of new services to its residents. Given the institutional stability of cities like Gustine, the application is far from speculative.

Other applicants, including that of the University of Texas-Pan American propose innovative arrangements designed to enhance educational opportunities for area residents. UT-PA has borrowed an idea from the ITFS service; it proposes to activate distance learning services for the residents of this educationally impoverished area.

Other examples of legitimate waiver requests -- each in the public interest -- certainly exist within these 971 applications. CCA respectfully urges that a more cautious approach to processing these applications stands to best serve the public interest. It is

unlikely, furthermore, that this new service will be detrimental to already-assigned users since the Commission, itself, has pointed out that this band has historically been underutilized. *NPRM at ¶ 5.*

Again, CCA hopes the Commission will re-consider its blanket denial of these pre-filed applications. Alternatively, upon dismissal of their applications, these early applicants should receive a full refund of all previous filing fees.

Flexible Licensing is Key To Increased Competition

While the Commission believes that video programming will initially be the largest use of this new spectrum allocation, it also envisions that spectrum users may provide other types of point-to-point and point-to-multipoint communications including PCS service. CCA agrees with the Commission's view that a flexible approach to licensing the redesignated 28 GHz band fixed service allocation to any video or telecommunications use on either or both the vertical and horizontal polarization planes of the assigned frequency will ensure an abundance of exciting new services -- both video and non-video based. Additionally, flexible licensing procedures will promote efficient spectrum use. Thus, CCA endorses the Commission's plan to let licensees design their systems in accordance with market demand.No Special Set-Asides Required

The Notice of Proposed Rulemaking asks whether one-half of this spectrum should be reserved for educational and non-commercial programming. Again, CCA believes market demand should determine the best use of this spectrum, and that -- given effective competition -- the public interest will be served without the need

for special set asides.

Limited Service Areas Will Accommodate More Competitors

Initially, the Commission proposes to carve up the band into two 1000 MHz segments, the "A and B bands." Each segment could be further subdivided into 20 MHz channels. Licensees will be free to employ their entire 1000 MHz segment for video carriage or they can use portions for telecommunications services including point-to-multipoint data, video or telephony. The Commission has also indicated that it will be open-minded about alternative proposals including the possibility of providing for four segments of spectrum -- two larger segments for video programming and two smaller segments for other telecommunications services. Clearly, more spectrum segments can accommodate more competitive operators. However, from a pure administrative standpoint, there is appeal in the plan to award two spectrum segments per area. Enhanced competition -- CCA believes -- can best be promoted by limiting the size of service areas.

Healthy Competition Will Best Serve Consumers

The Commission has also proposed that licensees be able to elect whether to be treated as common carriers or non-common carriers on a channel-by-channel and/or cell-by-cell basis. The Commission is particularly interested in knowing how this election would impact on consumers, especially the implications of permitting non-video programming services to be regulated as non-common carriers. CCA respectfully suggests that since competition is emerging in the non-video programming area, perhaps stringent

common carrier regulation is not currently required to protect these consumers. As the FCC has suggested, this policy could be revisited should LMDS ultimately develop into a monopoly service.

Video Dial Tone's "No Franchise" Policy Would Spur LMDS Development

As for the application of video dial tone policies to common carriers who provide video services over LMDS, CCA supports the pro-competitive thrust of the Commission's video dial tone initiative. In particular, CCA agrees with the Commission's view that video dial tone customers need not be fettered by the need for a local cable franchise. In fact, CCA would, and has, gone further. CCA argued that pole attachment service customers, in addition to video dial tone users, should not be subjected to onerous, anticompetitive local franchising practices. *See Further Comments of Competitive Cable Association,* CC Docket 87-266, October 13, 1992.

Competition Substitutes for Burdensome Tariff Requirements

The Commission proposes that those LMDS licensees who opt for common carrier status should be classified as non-dominant carriers with the attendant streamlined tariff regulation requirements (similar to the treatment of today's MMDS operators). To the extent that tariff filings may actually lead to anticompetitive behavior, *e.g.*, collusive pricing tactics, they should be discouraged. It is likely, in fact, that more innovative services may develop in the absence of mandatory tariff filings. Those carriers who seek to maintain their competitive position may well make rates and other competitive information available to consumers despite

the absence of tariff filing rules.

At any rate, CCA agrees with the Commission's view that adequate competition already exists in the marketplace -- in the form of MMDS, cable television,[1] lower power television, broadcasting, and HTVRO/C-band services -- to thwart the de facto creation of LMDS monopolists. And, additional competition from DBS looms in the not too distant future.

Preemption Will Facilitate Competition

Because the FCC is without enough factual information to determine whether state and local regulations will conflict with the LMDS rules, it intends to look at those facts before invoking federal preemption. On the other hand, the agency currently concludes that preemption -- of state entry and rate regulation, at least -- will occur. CCA respectfully urges that federal preemption of these areas is crucial lest LMDS get caught up in the same regulatory quagmire that hard-wired competitive operators currently experience.

Basic Trading Areas Are Too Large to Enhance Competition

The Commission currently envisions licensing LMDS operations in the 487 "Basic Trading Areas" (BTAs) identified in the Rand McNally 1992 Commercial Atlas and Marketing Guide. With the addition of Alaska and Puerto Rico, a total of 489 regional licenses will be available for prospective operators. However,

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[1] Over 10,000 cable systems now operate in the United States. These systems reach over 90% of the nation's households and serve over 60% of homes passed. *Report and Order,* MM Docket No. 82-434, 7 FCC Rcd 6156, 6162.

while the FCC has indicated a strong interest in providing enough service area to make for truly viable competitive systems, it is also amenable to other ideas. For instance, it may consider alternative types of service areas, e.g., cellular-type metropolitan and rural service areas, or Areas of Dominant Influence.

CCA believes the goal of increased competition can best be attained only if an abundance of operators can gain a foothold, no matter what their size and strength. Thus, smaller service areas would be a greater boon to competition. For instance, some BTAs, e.g., Los Angeles, are almost unwieldy in size. The use of BTA-based service areas may discourage smaller, undercapitalized operators -- operators similar to the pioneers who once built the cable industry into today's greatness. Clearly, capital formation becomes increasingly difficult in larger markets. At a minimum, some relief valve must be built into the plans to encourage smaller entrepreneurs. Perhaps the "market" could be defined in terms of square miles or by counties.

Cross-Ownership Bans Should Be Avoided

The Commission perceives some tension between its view that LMDS need not be weighed down with needless cross-ownership prohibitions and Congress' pro-competitive goals of the 1992 Cable Act. Thus, it invites commenters to weigh in on this issue. However, CCA would discourage any premature burdening of this new service with excess bars, prohibitions, etc., before it can really tap into market demand and realize its potential. An early predisposition to allow certain technologies to participate at the expense of others simply denies current reality. That is, all of

the technologies are converging as we speak. And proscriptions that served to keep technologies separate are slowly being relaxed in favor of the public policy goals of enhanced competition.[2] Rather than hampering the entrepreneurial bent of would-be competitors, no matter what their current, primary technology, why not let any competitors who have the wherewithal seek additional capital and establish a new competing service?

Early Filers Should Receive A Preference Rather Than Dismissal

CCA agrees with the Commission's view that LMDS need not be hobbled with the ponderousness of comparative hearings. However, whether the Commission decides to choose from among mutually exclusive applicants by random lottery or by competitive bidding, CCA would urge that everyone who already filed applications for this spectrum in accordance with the dictates of Part 21 of the Commission's Rules should receive a preference in any lottery that is established. The preference for early filers should be awarded in addition to any preferences that might be awarded in accordance with the Commission's diversity goals in mind.

One Application Per Market Will Ensure Real Competition

An applicant may only file one application per market area. However, interests in *bona fide* publicly-held corporations of less

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[2] Even national television networks, formerly barred from ownership of cable television systems pursuant to 47 C.F.R. § 76.501(a)(1), will be permitted to own cable systems subject to some restrictions, including, *inter alia,* a limit on homes passed by a network-owned cable system within a local market and the operation of the broadcast-cable cross-ownership rules, *i.e.,* 47 C.F.R. § 76.501(a)(2). *Memorandum Opinion and Order,* MM Docket 82-434, released February 23, 1993.

than one percent will not be considered cognizable interests for the purpose of this proposal rule. CCA agrees with this proposal which, arguably, will further the diversity of voices in the marketplace.

Spectrum Sales Are Unlikely To Spur Competition

The Commission proposes that LMDS applicants pay an initial filing fee of $155 per station for a blanket license for fifty channels in the A or B Band. Upon building one or more cells, a further fee of $455 for each of the fifty 20 MHz channels (or $22,750) will be required. No further filing fees will be required for the system. CCA respectfully cautions that such steep fees come precariously close to resembling a spectrum sale. Of course, spectrum sales inherently favor those with the most resources. Competitive operators understandably gather resources as they grow in strength and size. A spectrum sale, CCA respectfully cautions, is likely to thwart the development of real competition to the benefit of the entrenched, financially mighty few.

Respectfully submitted,

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